Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
	)	
Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham	)	CG Docket No. 05-338
	)	

Comments

in Support of the Petition for Declaratory Ruling

filed by the

National Consumer Law Center

on behalf of its low-income clients

These comments by the National Consumer Law Center (NCLC) on behalf of its low-income clients are filed pursuant to the Public Notice issued by the Consumer and Governmental Affairs Bureau in the above-named proceeding.[1] We comment to support the Petitioners' request that the Commission remove the uncertainty regarding the meaning of "prior express consent" in the Telephone Consumer Protection Act (TCPA).[2] Specifically, we urge the Commission to rule that "prior express consent" must actually be express, as opposed to implied, and must be actually be consent to receive autodialed and/or artificial voice or prerecorded calls to a specified cell phone number.

In 2008 the Federal Communications Commission (FCC) said –

> We conclude that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone

[1] Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Comment on National Consumer Law Center Petition for Reconsideration of the FCC's Broadnet Declaratory Ruling, CG Docket No. 02-278 (Rel. Feb. 8, 2017), *available at* https://ecfsapi.fcc.gov/file/0208137810929/DA-17-144A1.pdf.

[2] 47 U.S.C. § 227(b)(1)(A)(iii).

subscriber to be contacted at that number regarding the debt.[3]

Many courts considering the issue have pointed out that this determination by the FCC is hard to justify, as it treats what at most might be implied consent as the "express consent" required by the statute.[4] Moreover, even if providing a number can be construed as consent to receive a call, it is hard to construe it as consent to receive autodialed or prerecorded calls.[5] Indeed, the FCC's interpretation was expressly rejected by the Senate Committee's report accompanying the passage of

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[3] Request of ACA International for Clarification and Declaratory Ruling ¶ 9, No. 02-278, FCC Release 07-232, 23 F.C.C. Rcd. 559, 565, 43 Comm. Reg. (P & F) 877, 2008 WL 65485 (Jan. 4, 2008). *Accord In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 ¶ 52, 30 F.C.C. Rcd. 7961, 2015 WL 4387780 (F.C.C. July 10, 2015) (reaffirming this position).

[4] *See* Reardon v. Uber Technologies, Inc., 115 F. Supp. 3d 1090, 1099, n.5 (N.D. Cal. 2015) (following FCC's interpretation, but disagreeing with it because providing a telephone number is at most implied rather than express consent); Zyburo v. NCSPlus, Inc., 44 F. Supp. 3d 500, 503 (S.D.N.Y. 2014) (patient's provision of telephone number to medical office in context wholly divorced from debt collection does "not appear to be tantamount to even implied consent to be robo-called by a third party about one's debt"); Lusskin v. Seminole Comedy, Inc., 2013 WL 3147339, at *3 (S.D. Fla. June 19, 2013) (concluding that FCC's order "deviates from the plain language of the statute"; providing cell phone number when buying a comedy show ticket was not consent to receive autodialed text messages promoting other shows when seller never told subscriber that it might send him autodialed text messages; however, Eleventh Circuit's later decision in *Murphy v. DCI Biologicals Orlanod, L.L.C.*, 797 F.3d 1302 (11th Cir. 2015), holds FCC's interpretation to be incontestable); Thrasher–Lyon v. CCS Commercial, 2012 WL 3835089, at *5 (N.D. Ill. Sept. 4, 2012) (treating FCC ruling as binding, but concluding that it goes beyond plain language of the TCPA, and refusing to apply it outside the context of a voluntary transaction giving rise to a debtor-creditor relationship). *See also* Mais v. Gulf Coast Collection Bureau, 944 F. Supp. 2d 1226, 1239 (S.D. Fla. 2013) ("The FCC's construction is inconsistent with the statute's plain language because it impermissibly amends the TCPA to provide an exception for 'prior express *or implied* consent'"), *rev'd*, 768 F.3d 1110 (11th Cir. 2014) (finding FCC's ruling incontestable under Hobbs Act).

[5] *See* Hill v. Homeward Residential, Inc., 799 F.3d 544, 554 (6th Cir. 2015) (Clay, J., concurring) (" The notion that a debtor gives his prior *express* consent to receiving calls from a creditor using an auto-dialer or prerecorded voice simply by giving his cellphone number to the creditor strikes me as contrary to both the plain language of the statute and the underlying legislative intent."); Thrasher–Lyon v. CCS Commercial, 2012 WL 3835089, at *3 (N.D. Ill. Sept. 4, 2012) (statute should be interpreted to require prior express consent to robocalls, not just to calls in general). *See also* Lusskin v. Seminole Comedy, Inc., 2013 WL 3147339, at *3 (S.D. Fla. June 19, 2013) (providing cell phone number insufficient when subscriber never gave express consent to be contacted through an autodialing system; however, Eleventh Circuit's later decision in *Murphy v. DCI Biologicals Orlando, L.L.C.*, 797 F.3d 1302 (11th Cir. 2015), holds FCC's interpretation to be incontestable).

the TCPA when it said "The Committee … believes that such automated calls . . . . only should be permitted if the called party gives his or her consent to the use of these machines."[6]

Given the TCPA's requirement that consent to receive robocalls be express, we urge the Commission to clarify that a consumer's provision of a cell phone number is at most consent for the business to call that number, not consent to be called by an autodialer, or to receive artificial voice or prerecorded calls.

Respectfully submitted, this 8th day of March, 2017.

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[6] S. Rep. No. 102-178, pp. 304 (1991).